SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 346

STONEWALL COTTON MILLS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on June 3, 1942 (R. 226). The decision of the court overruling the motion for a rehearing was rendered on July 6, 1942 (R. 253), copies of which are attached as Appendices 1 and 2.

II.

Jurisdiction.

Jurisdiction is invoked under the Judicial Code, Sec. 240, as amended by Act of February 13, 1925; 43 Statutes at Large 938, Sec. 347, U. S. Ann. Code, Title 28.

III.

Statement of the Case.

Reference is respectfully made to "A Summary Statement of Matters Involved," *supra,* in the petition for certiorari, as a statement of petitioner's case.

IV.

Specifications of Error.

Specification No. 1.

The Circuit Court of Appeals for the Fifth Circuit committed error in holding that the petitioner had restrained and coerced its employees, as found by the Board, in violation of Section 8, Paragraph 1, of the National Labor Relations Act, and in ordering petitioner to desist.

Specification No. 2.

The Circuit Court of Appeals for the Fifth Circuit committed error in holding that petitioner discriminated in regard to the hire and tenure of W. A. Taylor, in violation of Section 8, Paragraph 3, of the Act, and in directing petitioner to reinstate the said Taylor with back pay.

Specification No. 3.

The Circuit Court of Appeals for the Fifth Circuit committed error in holding that petitioner had refused to bargain collectively with the union in violation of Section 8, Paragraph 5, of the Act, and in ordering petitioner to desist therefrom.

Specification No. 4.

The Circuit Court of Appeals for the Fifth Circuit committed error in failing and refusing to annul and set aside

the order of the National Labor Relations Board complained of.

Specification No. 5.

The Circuit Court of Appeals for the Fifth Circuit committed error in affirming the order of the National Labor Relations Board, in the particulars set out in Specification No. 1 and Specification No. 2, and not refusing to annul and set aside the same.

ARGUMENT.

Point I.

The Circuit Court of Appeals of the Fifth Circuit committed error in holding that the petitioner restrained and coerced its employees in the exercise of rights guaranteed under Section 7 of the Act, and in violation of Paragraph 1, Section 8 of the Act, for that such finding is not supported by substantial evidence.

It is well settled that the findings of the National Labor Relations Board must rest upon substantial evidence. The test is not satisfied by evidence which merely creates suspicion or which amounts to no more than a scintilla of evidence. The following authorities are directly in point:

Consolidated Edison Co. v. *N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *N. L. R. B.* v. *Columbian Co.*, 306 U. S. 292, 59 S. Ct. 501, 83 L. Ed. 660; *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 58 S. Ct. 1041, 305 U. S. 555, 82 L. Ed. 1524; *Remington-Rand* v. *N. L. R. B.*, 58 S. Ct. 1046, 304 U. S. 576, 82 L. Ed. 1540, re-hearing denied, 58 S. Ct. 1054, 304 U. S. 590, 82 L. Ed. 1549. *N. L. R. B.* v. *The Lion Shoe Co.*, 97 Fed. (2d) (1st Cir.) 448; *Ballston-Stillwater Knitting Co.* v. *N. L. R. B.*, 98 Fed. (2d) (2 Cir.) 758; *Republic Steel Corp.* v. *N. L. R. B.*, 107 Fed. (2nd) (3 Cir.) 472; *Martel Mills Corp.* v. *N. L. R. B.*, 114 Fed. (2d) (4 Cir.) 624; *N. L. R. B.* v. *Gosher Rubber & Mfg.*

Co., 110 Fed. (2d) (6 cir.) 432; *Foote Bros.* v. *N. L. R. B.*, 114 Fed. (2d) (7 Cir.) 611; *Hamilton-Brown Shoe Co.* v. *N. L. R. B.*, 104 Fed. (2d) (8 Cir.) 49; *N. L. R. B.* v. *Grower-Shipper Assn.*, 122 Fed. (2d) (9 Cir.) 368.

Section 7 of the National Labor Relations Board Act, being Title 29, U. S. C. A., Section 157, is in the following language:

> "*Right of employees as to organization, collective bargaining, etc.*
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. (July 5, 1935, c. 372, Sec. 7, 49 Stat. 452."

Section 8 of the Act, being Title 29, U. S. C. A., Section 158, contains the following language:

> "*Unfair labor practices by employer defined.*
>
> It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to Section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

organization: Provided, that nothing in Sections 151-166 of this title, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under sections 151-166 of this title.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (q) of this title. (July 5, 1935, c. 372, Sec. 8, 49 Stat. 452."

The National Labor Relations Board (R. 165) held that the petitioner interfered with, restrained and coerced its employees in the exercise of rights guaranteed by the act.

In order to determine that the finding of the Board is unsupported by substantial evidence, we will slightly review the evidence, which is undisputed.

The finding of the Board was based upon an alleged telephone conversation had between Harrington, secretary of the petitioner, and Berman, manager thereof, over long distance telephone to Cincinnati, where the latter was. According to the evidence, the local union caused notices to be published of a meeting of the local union, composed largely of petitioner's employees. Berman suggested, so it is claimed, that some one go to the meeting and mingle with the employees. However, according to the evidence, Berman reconsidered and told Harrington, the secretary, to consult the company's attorney, Mr. Jacobson, but no action was taken by the petitioner at the meeting. There

was absolutely no evidence of any action on the part of any of the petitioner's officers or agents to influence its employees with respect to the meeting because Harrington denied and Berman denied that any such conversation took place over the telephone. The Board made its findings, although there was no testimony of any character that as a result of the conversation, or otherwise, there was any action on the part of the petitioner or its officers to influence or coerce its employees.

Therefore, we submit that the charge is not supported by testimony of any character, whether substantial or not. Even if it be true that the telephone conversation took place and the Board disbelieved Harrington and Berman in their statements that the conversation did not take place, nothing is proved.

The testimony in respect thereto will be found at Tr. 592, Tr. 595, and Tr. 1190.

The finding of the Board was further based on the charge of anti-union expressions of President Berman in December, 1938 (R. 168). The only testimony with respect thereto will be found at Tr. 135 and Tr. 1221.

Berman, the president of the company, is charged with having stated at a meeting of the members of the local union and representatives of the union, that he would have to shut the mill down if he were to change his former policy of never signing such a contract, explaining that he had never done so. We respectfully submit that a reading of the testimony shows that Mr. Berman never made any such statement. The testimony shows that what he really said was that he would have to shut down if he had to pay cut wages, and if he had to change his policy at that particular time when he was putting a new fabric on the market, and if his mill continued losing money.

It was undisputed that Mr. Berman suggested that the union hold an election, and that if a majority wanted to

join the union, that they would get together and work out an agreement satisfactory to both sides (Tr. 45-46).

There is nothing in the record to indicate that Mr. Berman's statements were intended to coerce anybody, or that the union's representatives so considered the same, and it is undisputably shown that the statements did not have the effect of coercing the union or that the activities of petitioner's employees or the union were affected by this statement in the slightest degree. A large number of petitioner's employees became members of the union and remained in petitioner's employ.

The finding of the Board is based also on an alleged anti-union expression of a man by the name of Priester in the employ of the petitioner. It is alleged that Priester was informed by Holloman that a union was going to be formed. He asked, "What sort of a union is that you all are getting up now?" To which Holloman replied, "It is the A. F. of L." Whereupon Priester wanted to know whether Holloman was a member, and Holloman replied that he was.

The testimony in respect thereto is found at Tr. 248, and Tr. 1095.

It was again charged that Privett had said to Holloman that he had better get out of the union and stay out of it or the mill will shut down and starve us to death (R. 167).

The testimony with respect thereto will be found at Tr. 42, Tr. 251, Tr. 1096, Tr. 1585.

Again, the Board charged (R. 170) that Privett, an overseer, stated that if he did not stop associating with certain employees he was going to discharge him. The testimony is found at R. 170, and Tr. 1586, and Tr. 1001.

Again, the Board charged that Harrington was guilty of anti-union expressions (R. 172), wherein he had referred to Taylor as an agitator and trouble-maker. The testimony in respect thereto will be found at Tr. 393, 396, 397, 399, and 400.

Again, the Board found that McCrary, the head card grinder (R. 173) remarked that he would not work organized labor at all, and that if the plant became a closed shop he would pack his tool box and leave. The testimony in respect thereto is found at Tr. 1550, 1554.

The testimony showed that Stonewall, Mississippi, is an isolated community of some 2,000 people, living in an unincorporated village, twenty miles distance from the nearest town. The petitioner owns the property and houses and most of the families work in the mills. This is a rural section where the people all know each other, and most of them are related by blood or marriage. The evidence indicates that such statements complained of were merely isolated statements, but lose all significance when surrounded by the actual facts. There is nothing to indicate that the remarks had the slightest effect in preventing or discouraging union membership, and there is no connection that the statements had any effect on union activities.

There were employed at the mill 900 employees. 427 were union members, and the alleged complaints deal only with a few casual remarks among fellow employees, friends and relatives.

The authorities are thoroughly established that mere casual remarks, which do not appear to have been acted upon or influence union activity, are insufficient to establish coercion.

In the case of *Diamond T. Motor Car Co.* v. *N. L. R. B.*, 119 Fed. (2d) 978, where the superintendent of the company stated that if the owner of the plant found that there was a union organized, that he would lose his job, and the plant would be closed down, the court held that the statement, if made, was not to be defended, but it should be considered in the light of its effect upon the employees spoken to, and since it had no effect, the employer was not guilty of coercion or restraint.

The court used the following language:

"The Board also stresses the statement of Superintendent Courval to employee Tishcovske wherein he is alleged to have said that Mr. Tilt would not stand for an outside union and that they would lose their jobs. This statement if made is not to be defended, but it should be considered in the light of its effect upon Tishcovske as it was made to him alone. Apparently it did not impress Tishcovske, for he did not see fit to mention it in his discussion at the employees' meeting following Pierce's speech. Tishcovske later joined United and there is no evidence that he ever mentioned the supposed remark until the hearing before the examiner. Moreover, Pierce was the man highest in authority at the plant and his subsequent declaration to the men, where he openly and frankly told them that the problem was their own and that they were free to join any organization of their choosing in effect overrode and disavowed the previous expression of Courval.

"We likewise believe that the occasional inquiries of Pierce and others with relation to the circulation of C. I. O. cards and with reference to labor activities in the plant are overemphasized by the Board. It is to be noted that the trial examiner who heard the witnesses testify did not believe that the Company had interfered with or dominated Industrial. While this was not binding upon the Board in their consideration of the matter, it is strongly indicative of the character of the testimony.

"We think the evidence, considered as a whole, falls short of being substantial proof of dominance or coercion or unfair labor practices. In giving recognition to that freedom of action guaranteed the employee by the statute, care must be taken that in preserving it for the one we do not by the same act deny it to another. The petition of the company for vacation of the Board's order is allowed and the petition of the Board for enforcement is denied."

The following authorities are directly in point:

N. L. R. B. v. *Empire Furniture Co.*, 107 Fed. (2d) 92; *Martel Mills Corp.* v. *N. L. R. B.*, 114 Fed. (2d) 624; *N. L. R. B.* v. *Sands*, 306 U. S. 332; *Quaker State Oil Refining Co.* v. *N. L. R. B.*, 119 Fed. (2d) 631; *N. L. R. B.* v. *Air Associates, Inc.*, 121 Fed. (2d) 586; *N. L. R. B.* v. *Mathieson Alkali Works*, 114 Fed. (2d) 796; *N. L. R. B.* v. *Whittier Mills*, 111 Fed. (2d) 474.

The Board also made a finding (R. 171) that the petitioner was guilty of coercion by a certain notice posted by the petitioner calling attention of its employees to the approaching meeting. The testimony in respect thereto will be found at Tr. 162, 163, 326, and 1273.

Again, it was complained that the petitioner, while the election was in progress, urged its employees to take time off from their work in order to cast their vote (R. 171). The testimony in respect thereto will be found at Tr. 1276.

We respectfully submit that Mr. Berman's notice was a helpful and unbiased explanation made for the benefit of the petitioner's employees, and at their request. The notice was fair and explicit, and certainly the petitioner should not be condemned, but, upon the other hand, commended for permitting the employees to leave their machines during production hours, to vote in the election.

It is not contended that some of the employees had the privilege and others did not, or that there was any kind of disagreement. The testimony shows that every employee had the privilege of leaving his job and voting, and that the union won the election.

The authorities are well settled that mere friendly intercourse between employers, labor organizations, and its employees, in respect to union activities, does not constitute and is not a violation of the act in the absence of interference and coercion. The employer has a perfect right

to express an honest opinion or to state its policy and position.

N. L. R. B. v. *Union Pacific Stages*, 99 Fed. (2d) 153; *N. L. R. B.* v. *Asheville Hosiery Co.*, 108 Fed. (2d) 288; *Midland Steel Products Co.* v. *N. L. R. B.*, 113 Fed. (2d) 800; *Continental Box Co.* v. *N. L. R. B.*, 113 Fed. (2d) 93; *Press Co., Inc.* v. *N. L. R. B.*, 118 Fed. (2d) 937; *Jefferson Electric Co.* v. *N. L. R. B.*, 102 Fed. (2d) 949; *Virginia Electric & Power Co.* v. *N. L. R. B.*, 115 Fed. (2d) 414.

Point II.

The Circuit Court of Appeals of the Fifth Circuit committed error in holding that the petitioner had discriminated in regard to the hire and tenure of employment of W. A. Taylor in violation of the Act, because not supported by substantial evidence.

The decision of the Board will be found at R. 199. The testimony in respect thereto will be found at Tr. 151, 155, 157, 159, 165, 182, 183, 189, 190, 200, 600, 622, 703, 737, 778, 811, 843, and 1187.

The complaint concerning Taylor is based on the idea that as Taylor had quite a career in union affairs at Stonewall, had openly opposed the company in such matters, and had caused it inconvenience and annoyance, the company desired to punish him. It was shown that he was laid off. The petitioner claimed that Taylor's union activities were not taken into account in letting him off. The evidence established that Taylor was an indifferent and unfaithful worker; that his place was filled by more capable workers and that Taylor did not seriously seek the employment. It was undisputably shown that at the time Taylor was laid off that there was not enough work for three roving haulers; that it was a job for two men. The employer decided to let Taylor go and retain the other two,

both of whom were union men. Taylor admitted that his daughter, his son-in-law, and his daughter-in-law were working at the mill (R. 218).

There was no conflict in the evidence offered by the petitioner in respect to the occasion for the discharge of Taylor. It was not disputed. The witnesses offered were not impeached, and the conclusion drawn by the Board is not based upon substantial evidence but suspicion, and is not even supported by a scintilla of evidence. The inferences drawn by the Board under the evidence were not justified.

The presumption is that the employer did not violate the law, and the burden of proof is on the Board. If the employer's witnesses, as they did in this case, swear to the facts as existing for grounds of discharge, those witnesses must be impeached or contradicted. Such testimony cannot be simply ignored and disregarded.

The mere fact of membership in the union is not a guarantee against discharge, and where real grounds exist, it does not prevent it. The National Labor Relations Board has no managerial authority, and may not substitute its judgment for that of the employer. The Act requires that discrimination in regard to tenure of employment for both the purpose and effect of discouraging union membership. The Board does not have unlimited discretion in weighing the evidence concerning discharge. If real grounds appear, the employer has the right to discharge the employee though the facts may be capable of an inference that union activities were the occasion of the discharge. After all the employer is responsible for the management of the plant and has the right to employ whom he chooses and discharge any employee whom he sees fit for the proper management and conduct of the business, provided he does not discharge the employee for the purpose of discouraging union activities and the discharge has that effect.

The following authorities are directly in point:

Jefferson Electric Co. v. *N. L. R. B.*, 102 Fed. (2d) 949; *N. L. R. B.* v. *Sands*, 96 Fed. (2d) 721; *Waterman Steamship Corp.* v. *N. L. R. B.*, 103 Fed. (2d) 157; *N. L. R. B.* v. *Stover*, 114 Fed. (2d) 513; *Virginia Electric Co.* v. *N. L. R. B.*, 115 Fed. (2d) 414; *N. L. R. B.* v. *Union Mfg. Co.*, 124 Fed. (2d) 332.

Point III.

The Circuit Court of Appeals for the Fifth Circuit committed error in holding that the petitioner had refused to bargain collectively with the union in violation of the Act, because not supported by substantial evidence. The Board so found (R. 194). The evidence will be found at Tr. 430, 442, 447, 451, 453, 460, 461, 462, 463, 474, 522.

It is undisputed that there was continuous bargaining between the petitioner and the union. There is no proof in the record that petitioner did not meet and discuss those matters with an open and fair mind and with the intention to reach an agreement. The failure to agree cannot be said to have been attributable any more to the action of the petitioner than to the union's representatives. The parties were dealing with matters of a highly controversial nature. The petitioner is not to be charged with bad faith merely because it would not accede to the wishes of the National Labor Relations Board.

The authorities are well settled that it is not obligatory upon the part of an employer to enter into an agreement. It is only necessary that they meet and bargain collectively.

N. L. R. B. v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; 81 L. Ed. 393; *N. L. R. B.* v. *Bell Oil & Gas Co.*, 91 Fed. (2d) 509; *Black Diamond S. S. Corp.* v. *N. L. R. B.*, 98 Fed. (2d) 875; *Globe Cotton Mills* v. *N. L. R. B.*, 103 Fed. (2d) 91; *N. L. R. B.* v. *Lion Shoe Co.*, 97 Fed. (2d) 448.

We respectfully submit that the findings of the Board in the particulars hereinbefore mentioned are not supported by substantial evidence, and that the Circuit Court of Appeals for the Fifth Circuit committed error in enforcing the order of the Board and refusing to set the same aside. The Board has based its findings upon evidence that merely creates suspicion and rests upon nothing more substantial than guess and conjecture. The Board disregarded undisputed evidence inconsistent with its findings, and the Circuit Court of Appeals committed error in affirming its action.

We, therefore, respectfully submit that the decision of the Circuit Court of Appeals in this case is contrary to the applicable decisions of this Court and is contrary to the decisions of other Circuit Courts of Appeals dealing with the same matter.

In support of this proposition and in order to avoid repetition, we now refer the Court to the authorities assembled in sub-division "C" of petitioner's petition for a writ of certiorari, and ask that the same be considered as if set out in full herein.

Conclusion.

This is a case, therefore, which we respectfully submit calls for the exercise by the Court of its supervisory powers in order that the law may be finally settled, in order that the errors complained of might be corrected; that a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Fifth Circuit, and that the same should be finally reversed.

J. A. Covington, Jr.
Gabe Jacobson.
E. L. Snow.
William H. Watkins.
P. H. Eager.